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No. 377

IN THE SUPREME COURT OF THE UNITED STATES

BENJAMIN ARTHUR BOURNE,
Petitioner,

versus

LUTHER JONES,
Respondent.

PETITION FOR WRIT OF CERTIORARI
(With Brief Annexed)

TO THE CIRCUIT COURT OF

APPEALS FOR THE FIFTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

BENJAMIN ARTHUR BOURNE,

Petitioner,

—vs—

LUTHER JONES,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To The Honorable The Chief Justice and Associate Justice of the Supreme Court of the United States:

Your petitioner, Benjamin Arthur Bourne, respectfully prays for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit, to review a judgment of that Court entered June 30, 1953. A transcript of the record in the case, including the proceedings in said Circuit Court of Appeals, is furnished herewith in accordance with the Rules of this Court.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

Petitioner by this petition seeks to bring before this Court for review a decision of the Circuit Court of Appeals for the Fifth Circuit, affirming an opinion and judgment of Judge Whitehurst in the District Court for the Southern District of Florida, in a suit for infringements of plant patents for sugar cane, holding invalid certain patents owned by petitioner

on the grounds of prior public use for more than two years before the filing dates of the applications upon which the patents issued and on the ground that patentee was not the sole inventor but a joint inventor with one Stevens. Judge Whitehurst held, and the Circuit Court of Appeals for the Fifth Circuit affirmed, that United States Code, Title 35, Section 69 (R.S. 4920), requiring defendant to give plaintiff notice in writing 30 days before trial the names and addresses of alleged prior users and inventors, in the absence of which evidence cannot be offered on these defenses, was no longer the law but was superseded by the Rules of Civil Procedure for the District Courts. Other Circuit Courts of Appeal have held that the Code provision is still the law since the effective date of the said Rules of Civil Procedure for the District Courts. (Blanchard v. J. L. Pinkerton, Inc., C.C.A. 9th, 173 F.2d 573; Crosley Corporation v. Westinghouse Electric and Mfg. Co., C.C.A. 3rd, 152 F. 2d 895; Bank v. Rauland, C.C.A. 7th, 146 F. 2d 19; Minnesota Mining and Mfg. Co., C.C.A. 7th, 168 F. 2d 7, Cert. denied 69 S. Ct. 56; Charles Bloom v. Titus Blatter and Co., C.C.A. 2d, 1 Fed. Rules Service 12e24 Case 4; Turini v. Allen Mfg. Co., C.C.A. 1st 198 F. 2d 491.)

The Honorable Judge Whitehurst held, and the Circuit Court of Appeals for the Fifth Circuit affirmed, that there was prior public use in the absence of any specimen, exhibit or description of the alleged prior use article offered at trial. Other Circuit Courts of Appeal have held that there must be concrete visible proof of a contemporaneous nature to establish prior public use beyond a reasonable doubt as required. (Emerson & Norris Co. v. Simpson Bros., C.C.A. 1st, 202

Fed. 747; Brooks v. Sacks, C.C.A. 1st, 81 Fed. 403; Mast, Foos & Co. v. Dempter Mill Mfg. Co., C.C.A. 8th, 82 Fed. 327; Peerless Roll Leaf Co. v. H. Griffin & Sons Co., C.C.A. 2nd 29 F. 2d 646.)

The Honorable Judge Whitehurst held, and the Circuit Court of Appeals for the Fifth Circuit affirmed, that Stevens was a joint inventor with patentee, in the absence of a showing of determination of any taxonomic or morphological characters of the patented varieties of sugar cane, by Stevens, but in the face of Stevens' avowed statements that he did not determine any of the taxonomic or morphological characteristics and did not claim to be an inventor. Other Circuit Courts of Appeal have held that there must be a working together with each contributing for joint inventorship. (Pointer v. Sixwheel Corp., C.C.A. 9th, 177 F. 2d 153.)

The Honorable Judge Whitehurst held, and the Circuit Court of Appeals for the Fifth Circuit affirmed,, that there was prior public use, in the face of uncontroverted testimony of all witnesses that patentee filed applications for patents in the minimum time required to determine characteristics thereof by actual requisite tests from the seedling stage, i. e., 5 years; and the tests by patentee were necessary and conducted under a tri-party agreement of secrecy forbidding disclosure to others. Other Circuit Courts of Appeal have held that tests necessary to determine the characteristics of the thing patented is not public use, and a breech of trust by one during such time of the tests would not invalidate a patent. (Peerless Roll Leaf Co. v. H. Griffin & Sons Co., C.C.A. 2nd,

29 F. 2d 646; Reichel v. Dorset, 49 App. D.C. 198, 262 Fed. 652.)

The sugar cane industry of the continental United States is exclusively in the territory of Circuit Court of Appeals for the Fifth Circuit, and the particular varieties of sugar cane covered by the patents in question were bred for the Everglades Region of Florida; it is, therefore, improbable, if not impossible, that litigation in other Circuits, resulting in a conflict of decisions on the validity of the particular patents, would be likely to occur.

BASIS OF JURISDICTION

The discretionary power of this Court to grant a writ of certiorari is invoked upon the following grounds as set forth in Rule 38(5) of the Rules of this Court and decisions of this Court:

1. The decision of the Circuit Court of Appeals for the Fifth Circuit is in conflict with decisions of various other Circuit Courts of Appeal on the same question as to the state of the law of United States Code, Title 35, section 69 (R.S. 4920).

2. The decision of the Circuit Court of Appeals for the Fifth Circuit is in conflict with the decisions of other Circuit Courts of Appeal on the same question of law as to degree of proof required to invalidate a patent.

3. The particular patents involved dominate an industry concentrated in the territory of the Circuit Court of Appeals for the Fifth Circuit so that litigation in other Circuits resulting in a conflict of decisions is unlikely. (Exhibit Supply Co. v. Ace Patents Corp., 315 U. S. 126; Muncie Gear Works, Inc. v. Outboard Marine and Mfg. Co., 315 U. S. 759.)

QUESTIONS PRESENTED

I.

Was United States Code, Title 35, Section 69 (R. S. 4930), a valid law on July 31, 1950?

II.

In the absence of notice as required by United States Code, Title 35, Section 69 (R. S. 4920), are the defense of invalidity of patents on the grounds enumerated in said law available to defendant over objection of plaintiff?

III.

In the absence of a specimen, exhibit or description of an alleged prior public use article, has a defendant met the burden of proof to sustain a defense of prior public use?

IV.

In the absence of evidence of a jointly working together and sharing jointly contributing to a development, but on affirmative showing that only one determined and developed the article, can there be joint inventorship?

V.

Is there prior public use within the meaning of the patent statutes during the time patentee must test his invention to determine the characteristics thereof and its utility under service conditions before it can be described or before anyone in the art would purchase it?

REASON RELIED ON FOR ALLOWANCE OF THE WRIT

1. That the Circuit Court of Appeals for the Fifth Circuit in holding the Bourne Plant Patents Numbers 203, 210 and 220 invalid because of prior public use and Bourne not sole inventor, in the absence of 30 days' notice as required by U. S. Code Title 35, section 69 (R. S. 4920) and over objection of plaintiff-appellant, on the holding that said code provision was no longer the law, has rendered a decision in conflict with the decisions of the Circuit Courts of Appeals for the First, Second, Third, Seventh and Ninth Circuits, on the same matter, in Blanchard v. J. L. Pinkerton, Inc., C.C.A. 9th, 173 F. 2d 573; Crosley Corporation v. Westinghouse Electric and Mtg. Co., C.C.A. 3rd, 152 F. 2d 895; Bank v. Rauland, C.C.A. 7th, 146 F. 2d 19; Minnesota Mining and Mfg. Co., C.C.A. 7th 168 F. 2d, Cert. denied 69 S. Ct. 56; Charles Bloom v. Titus Blatler and Co., C.C.A. 2nd, 1 Fed. Rules Service 12e24 Case 4; Turini v. Allen Mfg. Co., C.C.A. 1st, 198 F. 2d 491.

2. That the Circuit Court of Appeals for the Fifth Circuit, in holding Bourne Plant Patents Numbers 203, 210 and 220 invalid because of prior public use in the absence of an exhibit, specimen or description of the alleged prior use article, has rendered a decision in conflict with the decisions of the Circuit Courts of Appeals for the First, Second and Eighth Circuits on the same matter, i. e., degree of proof to invalid a patent, in Emerson & Norris Co. v. Simpson Bros., C.C.A. 1st, 202 Fed. 747; Brooks v. Sacks, C.C.A. 1st, 81 Fed. 403; Mast, Foos & Co. v. Dempter Mill Mfg. Co.,

C.C.A. 8th, 82 Fed. 327; Peerless Roll Leaf Co. v. H. Griffin & Sons Co., C.C.A. 2nd 29 F. 2d 646.

3. The Circuit Court of Appeals for the Fifth Circuit in holding Bourne Plant Patents Numbers 203, 210 and 220 invalid on the grounds that Bourne was not the sole inventor, in the absence of a showing of any taxonomic or morphological characteristics being determined by another, and in the face of a clear denial by the alleged co-inventor that he determined any of the characteristics or was an inventor, is in conflict with the decisions of the Circuit Court of Appeal for the Ninth Circuit on the same matter, i. e., sole and joint inventions, in Pointer v. Sixwheel Corp., C.C.A. 9th, 177 F. 2d 153, section B, on page 157.

4. The Circuit Court of Appeals for the Fifth Circuit, in holding the Bourne Plant Patents Numbers 203, 210 and 220 invalid on prior public use within the time required for patentee to test and determine the characteristics of the plants under agreement of secrecy, is in conflict with the decisions of the Circuit Court of Appeals for the Second Circuit and the District of Columbia on the same matter, i. e., prior public use within the meaning of the patent statutes, in Peerless Roll Leaf Co. v. H. Griffin and Sons Co., C.C.A. 2d, 29 F. 2d 646; Riechel v. Dorset, App. D.C., 262 Fed. 652.

5. The Sugar Cane industry is concentrated in the territory of the Circuit Court of Appeals for the Fifth Circuit, so that litigation in other Circuits resulting in a conflict of decisions would not be likely to occur (Exhibit Supply Co. v. Ace Patents Corp., 315 U. S. 126).

THE IMPORTANCE OF THE CASE

The Bourne Sugar Cane Patents are the basic patents upon which the sugar cane industry of Florida was founded and exists today. This industry involves many millions of dollars a year. In that industry, petitioner has an important interest.

The present litigation is but one of many suits in the same district between petitioner and infringers. The outcome of this case will control the other cases and the numerous other defendants.

Moreover, the Circuit Court of Appeals for the Fifth Circuit has deprived Bourne of the fame of having been the sole inventor of an invention of primary commercial and scientific importance.

Wherefore, your petitioner respectfully prays that a Writ of Certiorari be issued under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Judicial Circuit, sitting at New Orleans, Louisiana, commanding said Court to certify and send to this Court on a day to be designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals had in this cause and all exhibits filed therein, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals be reversed, and that petitioner be granted such other and further relief as may seem proper.

Dated, West Palm Beach, Florida, September 8, 1953.

HAL H. McCAGHREN,
Attorney for Petitioner

STATE OF FLORIDA
COUNTY OF PALM BEACH } SS

Hal H. McCaghren, being duly sworn, deposes and says that he is attorney for petitioners herein; that he prepared the foregoing petition and that the allegations thereof are true as he verily believes.

HAL H. McCAGHREN

Subscribed and sworn to before me this 8th day of September, 1953.

(SEAL)

ETHEL GROSS,
Notary Public

IN THE SUPREME COURT OF THE UNITED STATES

BENJAMIN ARTHUR BOURNE,

Petitioner,

—vs—

LUTHER JONES

Respondent.

BRIEF ON BEHALF OF PETITIONER

This is a brief on behalf of Petitioner for Writ of Certiorari with Brief Annexed.

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JURISDICTION

Jurisdiction is involved under discretionary powers of this Court set forth in Rule 38(5) of the Rules of this Court and decisions of this Court:

1. Conflict of decision of the Circuit Court of Appeals for the Fifth Circuit with decisions of other Circuit Courts on the question of the validity of United States Code Title 35, Section 69 (R.S. 4920), on July 31, 1950.

2. Conflict of decision of the Circuit Court of Appeals for the Fifth Circuit with decisions of other Circuit Courts on the law of degree of proof required to invalidate a patent.

3. The particular patents involved dominate an industry wholly located in territory of the Circuit Court of Appeals for the Fifth Circuit so that litigation resulting in conflict of decisions is unlikely.

STATEMENT OF THE CASE

The Petitioner was Plaintiff-Appellant, below, Respondent was Defendant-Appellee. They will be referred to herein as Plaintiff and Defendant respectfully. The Transcript will be cited by page numbers in parenthesis, to-wit: (Tr. 1).

Plaintiff filed his complaint against Defendant for patent infringement of his United States Plant Patents, numbers 203, 210, and 220, and prayed for injunction, acounting, punitive damages, costs, and general relief. Plaintiff amended his complaint to add thereto copy of written notice of infringement to Defendant, and copies of the said patents (Tr. 1-9).

Defendant filed his Defense on Merits, admitting jurisdiction of the Court over the subject matter and the parties

and that Defendant has planted, cultivated and harvested the sugar canes described in the patents; but denying ownership of the patents by Plaintiff, and alleging the patents to be invalid, and the Plant Patent Statute to be unconsitutional (Tr. 9-13).

On July 26, 1950, only 4 days prior to trial, Defendant filed his Defense Specification, attempting to give Notice pursuant to Title 35, section 69, U. S. Code (Tr. 13-20).

On July 31, 1950, trial by the Court without a Jury was started, and resumed August 1, 2, 3, 4, 7, 8, 9, 10, 11, 1950; and, on August 11, 1950, the Court took the case under advisement pending filing of briefs (Tr. 21).

At trial Plaintiff proved ownership of the three patents and the infringement of each, which was admitted by Defendant.

Plaintiff further proved at the trial that he envisioned and conceived that the particular cross of parents he employed would result in many progeny, at least one individual of each cross would have the properties he sought. Accordingly, he had a parcel of land set aside by his employer, Southern Sugar Company, as a breeding plot for him. This plot was fenced, drained and equipped for irrigation. Plaintiff planted the parents, that he proposed to cross, in adjacent rows to facilitate cross-pollination; at the proper time he cross-pollinated the parents, collected the resultant seed, dried and planted the seed, selected the seedlings obtained and planted them in the field. The seedlings, by planting in the field, was first asexually reproduced to form a stool of many stalks. From these thousands of stools, Plaintiff made his first selections based on observations and tests. Plaintiff then

started the laborious task of extending, and testing these seedlings he had selected and given a number. As the extensions and tests progressed many varieties were eliminated until after the 1935-36 harvest and first full commercial mill run tests were evaluated and the three varieties selected, from the characteristics then ascertained, to be patented. All this work and tests were verified by the Plaintiff, independent witnesses, and contemporaneous documents.

All qualified expert witnesses appearing at the trial testified that at least five years of testing are required subsequent to the seedling stage to ascertain the characteristics of a new sugar cane variety; and a full commercial mill test run results would have to be known before they would use a new sugar cane variety commercially (Tr. 197, 198, 334, 339).

During a part of the time of these laborious tests, Plaintiff held dual employment, one employer being the Southern Sugar Company and its sucessors, and the other being the Everglades Experiment Station. There was during this period of time a tri-party agreement in effect between the Everglades Experiment Station, the Sugar Company, and the U. S. Department of Agriculture's Bureau of Plant Industry, to assist each other in testing new varieties of sugar cane (Tr. 335) (Defendant's Exhibits 7, 8). Plaintiff, accordingly, gave a portion of the seed pieces of these thousands of new varieties to Everglades Experiment Station, one of his employers, for soil testing; but, after ascertaining that other employees of the Experiment Station had failed to keep the varieties properly segregated so that the results of their tests could not have any scientific value, he continued all tests alone on Sugar Company land.

Defendant started to offer testimony of prior public distribution by Everglades Experiment Station, Plaintiff objected on the grounds that notice 30 days before trial was not given pursuant to R. S. 4920; U. S. Code, Title 35, Section 69 (Tr. 63, 183, 370). The Court ruled that this Statute was superseded by The Rules of Civil Procedure, and admitted oral testimony of prior public distribution, without corroboration of samples or description of the sugar canes received.

All witnesses called on prior public distribution admitted that the canes they had received were first experimented with to determine some of the characteristics, and not placed in use until approximately the time patent applications were filed (Tr. 185, 236, 237).

The witnesses, when confronted with contemporaneous documents, admitted their memory was wrong, and that they could not remember that many years back (Tr. 186). (Plaintiff's Exhibit 6).

Mr. Stevens, Agronomist at Everglades Experiment Station, to whom Plaintiff had given portions of the seedlings for testing, testified that he only made some sugar tests of the canes and split a stalk; and, that he didn't claim to be the inventor (Tr. 302, 303).

The Court on July 24, 1951, entered its opinion holding the patents invalid on prior public use, and also because Plaintiff was not the sole inventor but a joint inventor with Stevens (Tr. 21-34).

On August 3, 1951, Plaintiff filed motion for rehearing, amendment and correction of findings of facts and conclusions of law, and for supplemental findings of fact and conclusions of law. (Tr. 35-59). In this motion Plaintiff set

forth with specificity wherein the evidence was contrary to the findings and the law was misapplied or misapprehended by the Court.

On July 2, 1952, the Court entered ts order denying Plaintiff's motion, pro forma (Tr. 62).

Plaintiff entered and perfected his appeal to the Circuit Court of Appeals for the Fifth Circuit as set forth in the Statement of Points on Appeal (Tr. 67-74) on the grounds there set forth specifically, but generally alleging there was no evidence to support the findings, the findings were contrary to the facts, the ruling of the Court was contrary to the law, and the conclusions of law were contrary to the facts and law. The Circuit Court affirmed the District Court and denied rehearing. This Petition was duly filed to The Supreme Court.

ASSIGNED ERRORS

1. The Courts below erred as a matter of law in holding United States Code, Title 35, Section 69 (R. S. 4920) superseded by the Rules of Civil Procedure for District Courts.

2. The Courts below erred as a matter of law in holding Plant Patents Numbers 203, 210 and 220 invalid on the grounds of prior public use and patentee not sole and first inventor, in the absence of 30 day notice required by United States Code Title 35, Section 69 (R. S. 4920), and over objection of plaintiff.

3. The Courts below erred as a matter of law in holding that there was a joint invention of Plant Patents numbers 203, 210, and 220.

4. The Courts below erred as a matter of law in holding that there was prior public use within the meaning of the

patent Statutes of the subject matter covered by Plant Patents numbers 203, 210 and 220.

ARGUMENT

SUMMARY

The law is well established that failure of Defendant to give 30 days notice prior to trial as required by R. S. 4920; U. S. Code, Title 35, section 69, bars the affirmative defenses there enumerated, including the defenses of prior public use and patentee not sole inventor.

The undisputed evidence, particularly the contemporaneous documentary evidence and admissions of Stevens, clearly shows that Plaintiff alone bred, asexual reproduced, and determined the characteristics of the patented varieties within the minimum time set by the experts to determine these characteristics.

The record is noticeably lacking any specimen, drawings, exhibits or description by characteristics of any plants alleged to invalidate by prior public use; in the absence of which, under the law, proof of public use is too unreliable to form a safe basis for judicial action.

WHEREFORE, it is confidently submitted that the Opinion of the District Court and Final Judgment entered thereon for Respondent and against Petitioner, and affirmed by the Circuit Court, should be reversed, with directions to the Circuit Court to order District Court to enter Opinion and Judgment for Petitioner and against Respondent holding United States Plant Patent Numbers 203, 210 and 220 valid and infringed, and order accounting of the Respondent for profit and damages, enter injunction against further infringement by Res-

pondent, and assess costs against Respondent.

ASSIGNED ERROR 1 AND 2

The law is well settled that Defendant's failure to give written notice, at least 30 days before trial of patent infringement suit, that the invention of the patent had been in public use for more than two years prior to patentee filing his application, or that patentee was not the first and sole inventor, as required by the statute, barred such defenses.

The Statute, Title 35, Section 69, states " . . . the defendant . . . , having given notice in writing to the plaintiff or his attorney thirty days before, may prove on trial any one or more of the following special matters:

" . . . Fourth. That he was not the original and first inventor or discoverer of any material and substantial part of the things patented; or

" . . . Fifth. That it had been in public use or on sale in this country for more than two years before his application for a patent, or had been abandoned to the public.

"And in notices as to proof of previous invention, knowledge, or use of the thing patented, the defendant shall state . . . the names and residences of the persons alleged to have invented or to have had the prior knowledge of the thing patented, and where and by whom it had been used; . . . "

Blanchard v. J. L. Pinkerton, Inc., D. C. S. D. Calif. 77 F.S. 861, affirmed C.C.A. 9th, 173 F. 2d 573 (May 13, 1948) held: "In patent infringement suit, use of structure which was not pleaded as defense could not be considered as anticipation. 35 U.S.C.A.) 69, subd 5. The use of the 1932 structure was not pleaded as a defense, and cannot be con-

sidered as anticipation. 35 U.S.C.A. 69 (5); and see Electric Storage Battery Co. v. Shimadzu, 1930, 307 U.S. 5, 17, 59 S. Ct. 675, 83 L. ed. 1071."

Crosley Corp. v. Westinghouse Electric and Mfg. Co., D. C. Pa., 52 F.S. 884, affirmed C.C.A. 3rd, 152 F. 2d, 895, held: "The prior art patents and publications and the alleged instances of prior knowledge and use which were not pleaded in plaintiff's reply to the counterclaim herein, or otherwise noticed at least thirty days prior to the trial, against any particular patent in suit, as required by R S. (4920, 35 U.S.C.A.) 69, cannot be urged for purposes of anticipating or invalidating such patent."

Banks v. Rauland, C.C.A. 7th, 146 F. 2d 19 (Dec. 20, 1944) held: "Those findings are based upon prior art which was not pleaded, and it would be error to consider them on the question of anticipation or novelty. In conclusion, we affirm the district court's decision as to non-infringement, and as to invalidity of the claims because they are not sufficiently specific under the statute. As to the court's holding that the patent is invalid for any other reason, the decree is reversed."

Minnesota Mining & Mfg. Co. v. Industrial Tape Corp., C.C.A. 7th, 168 F. 2d 71 (May 6, 1948), cert. denied, 69 S. Ct. 56, stated: "In the first place, we must notice the contention that the McCarthy device was improperly relied upon by the defendant and the court because it was not pleaded by the defendant. It is asserted that the defense of anticipation must be pleaded or noticed, as required by Title 35 U.S.C.A., Sec. 69. The record discloses that these prior art devices of the plaintiff were exhibited and explained to the court by plaintiff's counsel in his opening statement and

that they were offered and introduced into the record by plaintiff. It perhaps is true, as asserted by plaintiff, that they were offered only for the purpose of showing the prior state of the art, and that such unpleaded devices can not properly be relied upon to show anticipation. Oswell v. Bloomfield et al., 7 Cir., 113 F. 2d 377, 378; Bank v. Rauland Corp., et al, 7 Cir., 146 F. 2d 19, 23; Hendy v. Golden State & Miners' Iron Works, 127 U.S. 370, 375, 8 S.Ct. 1275, 32 L.Ed. 207."

Charles Bloom, Inc., v. Titus Blatler & Co., Inc., C.C.A. 2nd, 1 F.R.S. 12e24 Case 4, held: "Plaintiff's request that defendant specify the number and dates and patentees of the patents referred to in the answer and the names of the countries in which they were secured, is denied without prejudice for the reason that the defendant must give this information 30 days before the trial, otherwise he cannot offer proof on the trial. Title 35, U.S.C.A. Sec. 69."

Turini v. Allen Mfg. Co., C.C.A. 1st, 198 F. 2d 491, also holds that United States Code, Title 35, Section 69, must be complied with or the defenses are not available to defendant.

ASSIGNED ERROR 3

The record clearly establishes that plaintiff-appellant determined all the characteristics of these canes alone. Stevens admits that he made only Brix and Sucrose determinations on canes, and doesn't even identify these canes by morphological characters (Tr. 39-40, 296, 302-3).

The law is well stated in Pointer v. Sixwheel Corp., 177 F. 2d 153, section B, page 157.

"To the contrary joint invention implies, as Robinson says, that two or more inventors agree "that a result, if it could be achieved, would be desirable, neither as yet having attempted to provide a means, and from this point go forward by mutual consultations and suggestions."

"And the product of the joint endeavor is a joint invention when, as the same author puts it, "before the entire conception of the invention by one inventor, another meets him and by his consent unites with him in exercising inventive skill upon the development and perfecting of the conception." 1 Robinson on Patents, p. 567.

"Here, there is no voluntary pooling of ideas."

ASSIGNED ERROR 4

The record clearly establishes that plaintiff-appellant filed applications for patents within 5 years from the seedling stage, which is the minimum period of time to conduct requisite tests for characteristics; and that the tri-party agreement forbade disclosure to others—i. e., it was secret revelopment. (Tr. 185, 186, 197, 198, 236, 237, 251, 258, 334, 339). Peerless Roll Leaf Co. v. H. Griffin & Sons, 29 F. 2d 646.

No specimen, exhibit or description of alleged prior use article was offered at trial.

The law is well settled that prior public use must be established not merely by testimony of witnesses, but by concrete, visible proof of a contemporary nature.

Mast, Foos & Co. v. Dempter Mill Mfg. Co., C.C.A. 8th, 82 Fed. 327, held:

"In considering the merits of the case, the defenses of prior use and no utility may be dismissed without extended

consideration. All the witnesses on both sides of the case testify that the combination of the internal-toothed spur-wheel with the pinion and the other usual machinery of a windmill and pump is more useful and more valuable than any other combination of elements in a windmill and pump yet discovered. The evidence of prior use is the testimony of a single witness, who was once in the employ of another infringer of the device of the appellant, but has since been employed by the appellee. He produces no part of the old windmill which he testifies was set up and put in operation before Martin filed his application, and his evidence is without the support of any patents or exhibits, and without the support of the testimony of any other witness. The unsupported oral testimony which will warrant a finding of prior use should be clear and satisfactory. It is always open to suspicion. It ought to be sufficient to establish such a use beyond a reasonable doubt. The Barbed-Wire Patent, 143 U. S. 275, 12 Sup. Ct. 443, 450; Deering v. Harvester Works, 155 U. S. 286, 300, 15 Sup. Ct. 118. The testimony for the appellee on this issue is not of this character, and it will be dismissed without further comment."

Peerless Roll Leaf Co. v. H. Griffin & Sons Co., C.C.A. 2nd, 29 F. 2d 646, held:

"The cases nearly always also raise the question whether the invention is in process of experiment or testing, and, while this honesty continues, the publicity of the use is not important. Egbert v. Lippman, 104 U. S. 333, 336, 26 L. Ed. 755; Elizabeth v. Pavement Co., 97 U. S. 126, 134, 24 I. Ed. 1000. It is probable that the use at bar was, at least in part,

and perhaps altogether, of this kind, but we prefer not to strain that aspect of the evidence. The word "public" means more than that the use shall not be experimental; it is possible, even after the time of experiment has passd, to practice the invention without abandonment. As inventor working by himself presents a simple case, but we cannot suppose that his rights are greater than those of a company. There must be some way by which they can privately practice their inventions as well as he, and yet any practice involves the knowledge of some employees. When the number of these is limited to as few as are necessary to practice it at all, when customers and the public generally are excluded, and adequate precautions are taken to prevent dispersion of the knowledge until at least two years before application is made, it seems to us enough, whether a formal pledge of secrecy be exacted or not. Those workmen who will keep it do not need it; those who will not, it will not bind. We do not mean that, if in fact knowledge leaks out, the invention may not be lost; as to that we say nothing. But when, as here, adequate means are taken to confine all information as closely as is consistent with any exploitation at all, and when, so far as appears, they are successful, the knowledge of the necessary workmen not explicitly pledged to security does not make the use public."

Emerson & Norris Co. v. Simpson Bros. Corp., C.C.A. 1st, 202 Fed. 747, and Brooks v. Sacks, C.C.A. 1st, 81 Fed. 403, held:

"This case, however, developed the underlying rule that ordinarily, in cases like the present, it is necessary that the anticipation should be supported, not merely by the testimony

of one or numerous witnesses relating to matters many years previous, but by concrete, visible, contemporaneous proofs which speak for themselves." "In that case (Brooks v. Sacks, 81 F. 403, C.C.A. 1st Circuit), the testimony of credible witnesses was rejected because there were no contemporaneous visible objects of that nature, and solely for that reason." The Court holds that "something more than oral testimony, even of the highest character, is required where there has been a considerable lapse of time."

CONCLUSION

It is respectfully urged that Petition for Writ of Certiorari be granted and decision of the Court below be reversed.

Respectfully submitted,

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September 8, 1953

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No. 377

FILED
NOV 2 1953
HAROLD B. WILLEY, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

BENJAMIN ARTHUR BOURNE,

Petitioner,

versus

LUTHER JONES

Respondent.

BRIEF ON BEHALF OF RESPONDENT

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The transcript of record will be referred to thus: (R.). Reference to Petitioner's brief will be referred to thus: (Br.). Unless otherwise indicated all emphasis is supplied by the brief writer.

STATEMENT OF THE CASE

So much of the Petitioner's statement of the case as sets forth the filing of the complaint and amendment thereto, the filing of defense on merits, the filing of defense specifications, trial of the case, the entry of a final decree for Respondent, the filing of a motion for rehearing, amendment and corrections of the findings of fact and conclusions of law, the entry of an order denying the motion, the perfection of an appeal to the Court of Appeals for the Fifth Circuit and entry of an order affirming the District Court and denying a rehearing are correct. However, the rest of the statement of the case which purports to set forth evidence (R. 4-5) is but the one-sided interpretation by Petitioner of isolated portions of the record. It completely ignores the findings of fact of the District Court (R. 21-34) and the voluminous record upon which those findings were based.

The Court of Appeals for the Fifth Circuit affirmed the Lower Court and held the the findings of fact were correct and were based on substantial evidence. This evidence established the following facts:

In the early twenties Louisiana was the only sugar producing area in the United States. A disease later known as "mosaic" was decimating the cane fields. Extinction was threatened. Faced with economic ruin, the industry turned to the United States Department of Agriculture to discover the cause of the disease and the possible remedy. After ten years of intense study, investigation and breeding, successful results were attained (R. DX5 and DX6).

Doctor E. W. Brandes began work on this problem in Puerto Rico in 1915 where he observed the disease spread to Louisiana, and discovered it was a virus disease transmitted by an insect vector (R. Brandes 187-189). His studies lead him to the conclusion that the disease could be controlled by varieties which were disease resistent and which would give an increased sugar yield. This lead to the development of the "tri-species" theory of crosses in breeding new varieties of cane and was the key to the success (R. Brandes 191). The "tri-species" pattern of crossing basically is the crossing of species saccharum officinarum, saccharum spontaneum and saccharum barberi involving the crossing of canes from New Guinea and India (R. DX4). *Dr. Brandes made the first* cross of seedlings producing a new variety in North America at Collins Key, Miami Beach, in the year 1919 (R. Brandes 194). Potentially each seed was a new and distinct variety and blooms were essential to the production of seed.

A year or two later Brandes established the Canal Point Field Station for the Department of Agriculture dedicated solely to long-range breeding program. In 1926 Brandes employed the Petitioner to operate this station. Bourne was then attending Cornell University; he had not yet obtained his Ph.D. Degree. He conducted this station until 1929 under the guidance of Dr. Brandes and Brandes taught him the tri-species method of crossing (R. Brandes 196-197).

Initially, this work was slanted towards new varieties for Louisiana since Florida had no cane industry. In the late twenties, commercial planting by Florida Sugar and Food Produce Company was underway in the vicinity of Canal Point. Before 1927 Southern Sugar Company succeeded Florida Sugar and Food Produce Company and by 1931 it in turn was succeeded by U. S. Sugar Corporation.

The State Experiment Station at Belle Glade became interested in testing new varieties for local use, as well as Canal Point. All interests decided to pool their scientific breeding work and entered into a cooperative agreement (R. DX7). This agreement was succeeded by another effective March 22, 1930 (R. DX8). Though signed by Southern Sugar Company, this agreement is still in full force and effect as U. S. Sugar succeeded to their assets and contracts when it took over the former (R. Bourne 91; R. Stevens 250).

Dr. Brandes imported foreign breeding stock making trips to Formosa, Phillipines, India and Indonesia. Eventually 700 original varieties were collected. Because of the danger of transmittal of disease no foreign cane could be brought in except through the United States Department of Agriculture (R. Brandes 195-196).

In 1929 Petitioner left the Canal Point Station and went to work for Southern Sugar Company, where he set up a breeding program for his employer. Southern Sugar Company went into receivership within a year and Bourne, then being out of a job, was employed as a cane breeder by Everglades Experiment Station

at Belle Glade, Florida, which at that time embarked on a breeding program of its own (R. Allison 224, 227-228; Stevens 250; Brandes 196).

A Dr. Allison, director of Everglades Experiment Station, a few months before Bourne became employed by it, employed F. D. Stevens, an experienced cane man who had worked for the United States Department of Agriculture in Louisiana for a number of years. The breeding program and sugar cane investigation were divided between these two men with Bourne assigned the task of making the crosses and Stevens doing the agronomic studies. Aside from breeding cane, which occupied his time only a few months during the short blooming season, Bourne conducted other cane work such as pathological and morphological studies outlined in his projects (R. Allison 224-228; Bourne 93; R. DX10, 11, 12, 13, 14, 16, 17, 18 and 19).

The mechanical act of making a cross involves merely the shaking of the pollen of a bloom of one sex into the inflourescence or bloom of another sex. A Negro or fiield hand often does this work and no two varieties can be crossed unless they bloom at the same time (R. Bourne 98). A single cross will often produce several thousand seeds. No prediction can be made which seed will produce the most desirable plant, so that all must be planted and after maturity those which show promise must be subjected to the arduous tests requisite in order to evaluate them (R. Bourne 99-107).

The "breeder" in this instance germinates the seed in flats under cover, transplanting good sprouts to pots where they continue to grow in the field house

and then after a certain stage of growth transplanting the same in the field. Upon maturity in the field the breeder discards all the new plants which do not show a hearty, thrifty growth upon visual inspection. Those left are subjected to a field test for total solids and sugar contents. This is done by boring the stalk, squeezing out the segment removed with a pair of pliers and examining the same with a Zeiss hand refractometer, which is done in the field. This test is to determine the potential sugar yield (R. 105-106; R. Stevens 246-248.). Countless plants are then eliminated and the remaining varieties which show promise are turned over to the agronomist for numerous tests to select the variety which are ready for commercial production (R. Stevens 248-249).

The agronomist takes the initial plant, known as a stool, and after harvesting it for seed cuts the stalk into sections of one eye each, and each section when planted in the ground produces a new plant. This is know as "asexual" reproduction and all further propagation from the original seedlings breeds completely true.

The cuttings are planted in a line or a row giving rise to the description "line test". On maturity the cane is subjected to more intensive tests. It is run through a small cane mill to extract the juice, which is then subjected to chemical analysis through Brix tests and polariscopic readings. Varieties which show promise under the line tests are further propagated in "increase" plots, for the purpose of establishing sufficient quantities of seed cane for multiple plantings. Once the necessary seed is produced upon maturity in the "increase" plots, widespread plantings are made

in numerous locations to test adaptability and suitability to various soil and climatic conditions. Each stage of planting (usually two to three times during the season when the cane is reaching maturity) is subjected to the same study and chemical analysis by the agronomist. Other physiological phenomena are studied such as disease resistance, maturity hardness, milling qualities, ratooning, stubbing and resistance to wind and cold. As these studies progress hundreds of the plants fall by the wayside. Out of one million crosses by the Canal Point Station there are only twenty new varieties that have been produced worthy of consideration (R. Stevens 240-241, 246-250; Bourne 105-107).

The agronomic studies to evaluate and select a new variety are indispensable. Without them no breeder or any cane man or men for that matter can tell the value of the new seedlings. To find a good new variety is a laborious process of trial and error (R. Brandes 201; Allison 225).

Petitioner made his first crosses for the Experiment Station in 1930 in a field at Lake Harbor, sometimes referred to as Miami Locks. This field was owned by Southern Sugar Company but had been furnished to the experiment station for its work. The plants produced by these crosses were know as the 30 seedlings. Subsequently one of them proved to be a good variety and was known as F30-35 now covered by Plant Patent 210 (R. Bourne 137). A year lated the 31 seedlings were bred. From them sprang F31-436 and F31-962, Plant Patents No. 220 and No. 203, respectively. On these series of crosses Petitioner bred

them and Stevens did the agronomic work from which the selection of these varieties was made (R. Bourne 99, 128, 132-150; Allison 224-225; Stevens 250, 252-253; R. DX34; DX14; DX16; DX30; DX31).

The crosses made by the Petitioner were for and on behalf of the Everglades Experiment Station, a substation of the University of Florida, and were made during and in the course of his employment. Stevens likewise performed his selective work as such employee (R. Stevens 251; Allison 224-225; R. DX-13-24, 28, 72-75, 77, 78; R. Bourne 120).

The Petitioner compiled and caused to be published a "bulletin" for dissemination by the Belle Glade Station, a copy of which he sent to "Facts about Sugar". This is a publication of a trade journal of general circulation through the cane world. The article discusses all the crosses made in 1903 and 1931 by the author. It lists the seedlings produced, including those under study. The three varieties in question were included among them. In addition to this there were other publications emanating from Bourne disclosing the new varieties under consideration. He filed notes and reports from time to time. Some of these went out in bulletin form. Annually he filed progress reports. Everything on record with the Station became public property accessible to any and all cane men who were interested. His annual reports were summarized in the State Experiment Station Annual Year Book and put in circulation (R. Bourne 111-113, 114, 201-202; Allison 227; R. DX2, 9, 29).

Species of sugar cane bear names but all new varieties bred are identified by a symbol number. The

letter "F" designates Florida for the Everglades Experiment Station where it was bred. In the symbol "F30-35", 30 designates the year in which the cross was made; the second number 35 refers to the number of seedlings of the cross. Every station has a similar symbol designation of varieties (R. Bourne 94-95; R. Stevens 252; R. Brandes 203; R. Fourmey 234).

The varieties of cane disclosed by the publications could be easily reproduced by any person by referring to the records of the Everglades Station, locating the cane in the field, cutting an eye from the stalk, planting it the ground and letting is grow. Because of this, meticulous care was exercised to accurately identify the variety of every cane plant at the field. Each seedling is tagged with its variety number. Detailed field maps were kept to identify and segregate the varieties (R. Brandes 203-204; R. Bourne 113; R. DX40-45; DX53-55; DX46, 49, 60, 63, 65, 67, 79-82).

As the new varieties from the crosses began to show promise and there was enough seed available for distribution, it was made available to cane growers. The Everglades' producers were in desperate need of good varieties free from disease. The growers could not await the usual routine of complete agronomic selection which would have delayed them a number of years (R. 243-244, 225-226). Stevens made distribution to the growers, the cane becoming their property for commercial use without strings with Stevens merely retaining the right of ingress and egress to observe the growth and take sample stalks for testing (R. Stevens 241). U. S. Sugar Corporation was the principal recipient of seed distribution. Its fields at Azucar, now Bryant, near Canal Point, were used by Everglades

Experiment Station for its heaviest increased plantings. All of U. S. Sugar Corporation's vast acreage of the patented varieties has its origin from original Experiment Station's seed cane. Among other Glades' growers who share in the distribution were Brown & Company, sometimes referred to as Shawano, and later known as Hillsboro Plantation; also Dixie Land & Cattle Company, H. S. Johnson, Arnold Brothers, Parker Bryant, Felsmere Sugar Company and numerous Florida cane growers. Before this distribution, test planting by Stevens was made at the Florida Experiment Station at Lake Alfred, Quincey and elsewhere (R. Stevens 243-245, 247, 252, 258, 270; R. Beckett 235; R. Heiser 182-184; R. Fourmey 323-341; R. Bryant 221-222; R. DX61, 62, 65, 66, 68, 69; DX63, 79-82).

Bourne then severed his connection with the Everglades Experiment Station and went to work for U. S. Sugar Corporation as Director of its Research Department (R. 90; DX25; DX26). No one at the Experiment Station or any of the growers or users of the cane derivatives were aware that Bourne had obtained a plant patent (R. 228; R. DX6; DX27). Upon changing jobs, Bourne, upon advice of his patent counsel, voluntarily recognized shop rights in the Experiment Station and the U. S. Sugar Corporation (R. Bourne 130-131; 150-151; DX27; DX70; DX32).

To promote the growth of cane, the U. S. Sugar Corporation organized a group of independent growers out of which the U. S. Sugar Corporation collected benefits in excess of one million dollars. The sugar company financed the grower, furnished him with seed cane, technical advice and such labor, equip-

ment and fertilizer as he might need to plant crops. The grower, in turn, by contract, sold his cane to a Clewiston mill owned by the Company. During the first two years the independent growers were limited to three in number, to-wit: Mr. Cowin, P. G. Bishop and Otto Larsen. *Bourne was designated* by the company to select the varieties and to furnish the seed cane, and is so doing he recommended the three varieties on which he claimed patent rights. In 1936 additional residents were brought into the organization (R. Redelsheimer 315-322; Larsen 305-314; Jones 170-182; Bishop 341-344; R. DX36).

The Petitioner never informed any of the growers of his patent or personal rights in the cane. Their plantings were open and notorious, available to the public and close to the Sugar Corporation cane fields. Bourne knew all about the alleged infringements all through the years before suits were filed (R. 341-344; R. Jones 176; R. Larson 307; R. Bourne 150-152).

Notices of infringement were sent out by Bourne's attorney on June 19, 1942 (R. 4).

Dr. Brandes, the instigator of the breeding procedure in Florida, testified that Petitioner performed no inventive ingenuity in making the crosses, and Stevens claimed that by his agronomic testing and selection he discovered the canes (R. Bourne 214-215; R. Stevens 289).

ARGUMENT

Summary

Rule 8(b) of the Federal Rules of Civil Procedure superseded the methods of pleading prescribed in 35 U.S.C. § 69 (1946) and there are no decisions of other circuits holding to the contrary on which to predicate this petition for certiorari.

The District Court found, and the record supports the findings, that Petitioner alone did not determine the characteristics of the patented varieties of sugar cane, but that one F. D. Stevens was a joint inventor. The evidence shows and the Court found that the Petitioner did the breeding work and Stevens did the agronomic work, which were inter-related, dependent parts of the joint project, making them co-inventors.

The evidence shows and the Court found that the only accurate way used by cane experts to identify the characteristics of sugar cane varieties is by the symbol number given each plant, which traces its geneology; not by its morphological characteristics. Experts rely on the records for identification, and Stevens and other users kept voluminous records, cards and maps contemporaneously with and showing the public use of the varieties by symbol numbers.

ASSIGNED ERRORS 1 AND 2

1. "The Courts below erred as a matter of law in holding United States Code, Title 35, Section 69

(R. S. 4920) was superseded by the Rules of Civil Procedure for District Courts."

2. "The Courts below erred as a matter of law in holding Plant Patents Numbers 203, 210 and 220 invalid on the grounds of prior public use and patentee not sole and first inventor, in the absence of 30 day notice required by United States Code Title 35, Section 69 (R. S. 4920), and over objection of plaintiff."

Neither the final decree of the Lower Court (R. 21-34), the order denying the motion for rehearing (R. 62), nor the decision of the Court of Appeals for the Fifth Judicial Circuit, made any reference to 35 U.S.C. § 69 (1946) or to the Federal Rules of Civil Procedure. The question arises only by virtue of a ruling by the Lower Court, during the progress of the trial, that Rule 8(b) of the Federal Rules of Civil Procedure superseded the statutory requirement of 35 U.S.C. § 69 (1946), (R. 63).

A careful examination of the printed reports of the decisions cited by Petitioner fails to disclose whether the effect of Rule 8(b), Federal Rules of Civil Procedure, was raised or considered. Certainly there is no statement in any of the cases reported that Rule 8(b) did not supersede 35 U.S.C. § 69 (1946).

What the decisions of other circuits might have been, had the issue been raised, is purely guesswork.

That the Advisory Committee on Rules so intended is clear from the note to Rule 8, Title 28,

U.S.C.A., at page 254, in which it was said:

> "This rule supersedes the method of pleading prescribed in U.S.C.A., Title 35 * * *, Section 69 (pleading and proofs of action)."

As to conflicts between the rules and statutes, it has been held:

> "Where a rule of civil procedure conflicts with a former statute, the rule prevails." *Penfield Co. of Cal.* v. *Securities and Exchange Commission,* 330 U.S. 585, 67 S. Ct. 918, 91 L.Ed. 615, (Cal. 1947).

That the textbook writers on federal practice so interpret the effect of Rule 8(b) cannot be questioned. 1 Moore, *Federal Practice,* 73, 565; 17 Hughes, *Federal Practice, Jurisdiction and Procedure,* § 19683.

ASSIGNED ERROR 3

3. "The Courts below erred as a matter of law in holding that there was a joint invention of plant patents numbers 203, 210 and 200."

This assigned error completely disregards the entire weight of the evidence and the findings of fact by the District Court which were approved by the Court of Appeals.

> "Finding of trial court in patent cases based upon conflicting testimony, lay or expert, must be sustained unless clearly erroneous. Federal Rules of

Civil Procedure, Rule 52(a), 28 U.S.C.A." *Pointer v. Six Wheel Corporation,* 177 F. 2d 153 (9th Cir. 1949).

The record establishes that Petitioner was employed by the Everglades Experiment Station as a breeder, and Stevens was employed as an agronomist (R. Allison 224-228; Bourne 93; DX10, 11, 12, 13, 14, 15, 16, 17, 18 and 19). It takes the combination of both the breeder and the agronomist to determine and select the characteristics, and the crossing, development and selection of the specific canes was the joint work of both Bourne and Stevens (R. Brandes 201; Allison 224-227). Stevens made what is known as a line test, and from the tests made by both men the characteristics of a sugar cane variety could be accurately determined. It was from these tests that selection of the patented varieties was made (R. Allison 225).

Based on this testimony, the decision of the Court of Appeals for the Fifth Circuit is not in conflict with any decision of any other corcuit court, and the finding that Petitioner and Stevens were joint inventors is amply sustained by the facts and the law.

ASSIGNED ERROR 4

4. "The Courts below erred as a matter of law in holding that there was prior public use within the meaning of the patent Statutes of the subject matter covered by Plant Patents numbers 203, 210 and 220."

Sugar cane is perishable. The crops are cut and

replanted and it is obviously impractical and unrealistic to suppose that stalks of cane will be preserved for the purpose of evidentiary use in future patent litigation where no one contemplates a patent will be obtained.

Irrespective of that, however, the experts testified in this case that the method used for identification is by symbol numbers (R. Bourne 94-95; Stevens 252; Brandes 203-207; Fourmey 234), which is more accurate than morphological characteristics as any number of varieties could enjoy or possess the same type of cell structure.

The testimony showed that meticulous care was exercised to tag every seedling with its symbol number. Detailed field maps were kept to identify and segregate the varieties. Because of the emergency existing, the growers could not wait for the usual routine of agronomic selection, and as the promising varieties were discovered, unequivocal distribution was made to various commercial users (R. Brandes 203-204; Bourne 113; DX40-45; DX53-55; DX46, 49, 60, 63, 65, 67, 79-82; R. 225-226, 241, 243-244).

Not only were the records of Stevens produced which showed contemporaneous public use, but numerous commercial users testified (R. 243-245, 247, 252, 258, 270; Beckett 235; Heiser 182-184; Fourmey 323-341; Bryant 221-222; DX61, 62, 63, 65, 66, 68, 69, 79-82).

From the records of the Experiment Station and the records, maps and cards of planting reflecting symbol numbers, an accurate description of prior use was produced and the lower courts so held.

This decision is not, therefore, in conflict with *Mast, Foos & Co.* v. *Dempter Mill Mfg. Co.*, 82 Fed. 327 (8th Cir. 1897), which had only the unsupported oral testimony of one witness to show public use.

Nor does *Peerless Roll Leaf Co.* v. *H. Griffin & Sons, Co.*, 29 F.2d 646 (2nd Cir. 1928) conflict, since the cane varieties were turned over to numerous growers for commercial planting and the public was not excluded.

Emerson & Norris Co. v. *Simpson Bros. Corp.* 202 Fed. 747 (1st Cir. 1913), and *Brooks* v. *Sacks*, 81 Fed. 403 (1st Cir. 1897), are not in conflict since the oral testimony was supported by complete, meticulous written records, maps and cards made contemporaneously with the public use.

CONCLUSION

Respondent respectfully submits that the decision of the Court of Appeals for the Fifth Circuit is not in conflict with decisions of other circuits and the certiorari should be denied. No argument was made on ground 3 on the basis of jurisdiction. In fact, no argument could be made because it is common knowledge that in Puerto Rico in the First Circuit and Hawaii in the Ninth Circuit raising of sugar cane for sugar production constitutes the major industry. Therefore, the cane patents do not dominate an industry concentrated in the Fifth Circuit.

Respectfully submitted,

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October 30, 1953